

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
DAVENPORT SCHOOLS, INC. D/B/A GREAT) File No. 0004187114
LAKES JR. COLLEGE)
Late-Filed Application For Renewal of)
Educational Broadband Service Station WLX253)
Request for Waiver of Section 1.949(a) of the)
Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 2010

Released: May 27, 2010

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants a request for waiver to allow late filing of an application for renewal of an Educational Broadband Service (EBS) license. We conclude it would be inequitable to deny the waiver request and terminate the license.

II. BACKGROUND

2. Under former Section 74.15(e) of the Commission's Rules, which was in effect until January 10, 2005, renewal applications for the Instructional Television Fixed Service (ITFS), the predecessor-in-interest to EBS, were due the first day of the fourth full calendar month prior to license expiration. Prior to March 25, 2002, ITFS was administered by the former Mass Media Bureau. That Bureau had a policy under which it would not accept renewal applications for ITFS stations that were not constructed.

3. On March 25, 2002, the Wireless Telecommunications Bureau (WTB) became responsible for administering ITFS. WTB began requiring unconstructed ITFS stations to submit renewal applications. WTB did not issue a public notice announcing this change in policy. Instead, when licensees filed requests for extension of time to construct for licenses that had expired, WTB returned the applications and asked the licensees to file renewal applications with waiver requests.

1 47 C.F.R. § 74.15(e).

2 See, e.g., Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division to University of Maine System, File No. BRIF-19990208AAL (MMB May 19, 2000).

3 Radio Services Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, Public Notice, DA 02-638 (WTB Mar. 18, 2002).

4 See, e.g., Notice of Return, File No. 20020802AAB, Ref. No. 3181820 (Dec. 6, 2004).

4. On October 19, 2007, WTB's Broadband Division (Division) terminated the license of Davenport Schools, Inc. d/b/a Great Lakes Jr. College (Great Lakes) to operate EBS Station WLX253 because Great Lakes had allegedly not constructed the station by June 17, 1992, the deadline required by former Section 73.3534(a) of the Commission's Rules, did not have on file an extension of time to construct the station, and did not timely file an application to renew Station WLX253.⁵ On November 5, 2007, Great Lakes filed a petition for reconsideration of the Division's decision, an application to renew Station WLX253, and a request for waiver of Section 1.949(a) of the Commission's Rules to permit it to late-file the application.⁶ On March 5, 2010, the Division granted the petition for reconsideration and ordered the reinstatement of the license for Station WLX253.⁷ The Division concluded that Great Lakes had demonstrated that the station had been constructed.⁸ The Division then concluded that Great Lakes should be given the opportunity to file a late-filed renewal application with a request for waiver.⁹ The Division ordered Great Lakes to file late-filed renewal applications with requests for waiver within 30 days after release of the *Reinstatement Order*.¹⁰ In the *Reinstatement Order*, the Division directed Great Lakes to make a showing explaining why it should be allowed to "split-the-football" if it believed it was entitled to such relief.¹¹

5. Great Lakes filed the instant Renewal Application on March 25, 2010, within the period established by the *Reinstatement Order*.¹² Great Lakes explains that it did not originally comply with the renewal deadline because it lost the assistance of its lessees and key personnel who had knowledge concerning its EBS license.¹³ It claims that it has acted "to shore up its internal knowledge of the regulatory requirements."¹⁴ It argues that grant of its Waiver Request would be consistent with other

⁵ Letter from Joel D. Taubenblatt, Federal Communications Commission to Davenport Schools, Inc. at 1-2 (dated Oct. 9, 2007) (Termination Letter). Former Section 73.3534(a) of the Commission's Rules required licensees to construct within eighteen months of the original authorization. 47 C.F.R. § 73.3534(a) (2003).

⁶ Petition for Reconsideration and Waiver Request, Davenport Schools, Inc. (filed Nov. 5, 2007) (Petition).

⁷ Davenport Schools, Inc. d/b/a/ Great Lakes Jr. College, *Order on Reconsideration*, 25 FCC Rcd 2254 (WTB BD 2010) (*Reinstatement Order*).

⁸ *Id.* at 2255 ¶ 4.

⁹ *Id.* at 2255 ¶ 5.

¹⁰ *Id.* at 2255 ¶ 6.

¹¹ *Id.* at 2256 ¶ 7. On March 18, 2008, the Commission adopted a declaratory ruling clarifying its policy concerning the division of overlapping geographic service areas (GSAs) between active EBS licensees and EBS licensees whose licenses expired prior to January 10, 2005 but are later reinstated. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, WT Docket No. 03-66, 23 FCC Rcd 5992, 6053-6060 ¶¶ 161-179 (2008) (*Declaratory Ruling*). In pertinent part, the Commission stated: "If a BRS or EBS license was expired on January 10, 2005, and such license is later reinstated *nunc pro tunc* pursuant to a waiver granted for a late-filed renewal application granted after the adoption date of this *Fourth Memorandum Opinion and Order*, that licensee's geographic service shall not include any portion of its former protected service area that overlapped with another licensee whose license was in active status on January 10, 2005 and on the date the expired licensee's late-filed renewal application was granted, unless a finding is made that splitting the football is appropriate because of manifest Commission error or other unique circumstances." *Id.* at 6060 ¶ 179.

¹² File No. 0004187114 (filed Mar. 25, 2010) (Renewal Application).

¹³ Renewal Application, Waiver Request (Waiver Request) at 1.

¹⁴ *Id.*

instances in which waivers for late-filed EBS renewal applications were granted.¹⁵ According to Great Lakes, grant of its Waiver Request will “will facilitate the restructuring of the 2.5 GHz band and ultimately provide service to schools in Michigan.”¹⁶ The Waiver Request did not address the “splitting-the-football” issue.¹⁷

6. The Renewal Application was accepted for filing on March 31, 2010.¹⁸ No petitions to deny or other oppositions were filed.

III. DISCUSSION

7. In determining whether to grant a late-filed application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.¹⁹ We may grant a request for a waiver when: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁰

8. Initially, we reject Great Lakes’ argument that the late-filed Renewal Application should be excused because of loss of personnel and the assistance of its former lessees. The Commission has repeatedly held that each licensee is solely responsible for knowing the term of its license and submitting a renewal application in a timely manner.²¹ Accordingly, we find that reliance on former lessees and loss of personnel do not justify a waiver of former Section 74.15(a) or current Section 1.949(a) to excuse the late filings.

9. Nonetheless, based on the circumstances surrounding Great Lakes’ late-filed Renewal Application, we conclude that a waiver is justified under the second prong of the waiver standard. Great

¹⁵ *Id.* at 2, citing In the Matter of 116 Late-Filed Applications For Renewal of Educational Broadband Service Stations, *et al.*, *Memorandum Opinion and Order*, 24 FCC Rcd 8108 (WTB BD 2009) (*116 Late-Filed Renewals Order*); Forty-One Late-Filed Applications for Renewal of Educational Broadband Service Stations, *Memorandum Opinion and Order*, 22 FCC Rcd 879 (WTB 2007); Central Catholic High School Foundation, *Order on Reconsideration*, 21 FCC Rcd 13807 (WTB 2006); Eastern New Mexico University, *Memorandum Opinion and Order and Order on Reconsideration*, 19 FCC Rcd 19540 (WTB 2004).

¹⁶ Waiver Request at 2.

¹⁷ *Id.*

¹⁸ Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 5762, *Public Notice* (rel. Mar. 31, 2010) at 1.

¹⁹ See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission’s Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11485 ¶ 22 (1999).

²⁰ 47 C.F.R. § 1.925(b)(3).

²¹ See *BRS/EBS R&O & FNPRM*, 19 FCC Rcd at 14248 ¶ 217 (“As an initial matter, the Commission has stated that each licensee is fully responsible for knowing the term of its license and for filing a timely renewal application.”); Daniel Goodman, Receiver, Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission’s Rules, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21944, 21972-21973 ¶ 53 (1998) (holding that “[i]t is the responsibility of each licensee to apply for renewal of its license prior to the expiration date of the license,” and that “failure of a licensee to receive a [renewal form] from the Commission is no excuse for failure to file a renewal application”)

Lakes has shown that in view of the unique factual circumstances of this case, applying Section 1.949(a) of the Commission's Rules, which requires licensees to renew their licenses "no later than the expiration date," is inequitable and contrary to the public interest.²² Recently, we held that it would be inequitable to strictly apply the renewal deadline against unconstructed EBS stations because, under the former Mass Media Bureau's policy, renewal applications would not have been accepted.²³ With respect to constructed EBS stations, we concluded, "It would be inequitable, however, to allow unconstructed stations to renew their licenses while terminating licenses of stations that constructed their facilities and attempted to serve students and provide service."²⁴ We believe the same logic applies to Great Lakes' Renewal Application. We also note that the Renewal Application is unopposed. Accordingly, we will waive former Section 74.15(e) and current Section 1.949(a) of the Commission's Rules and direct processing of the Renewal Application.

10. We conclude, however, that Great Lakes has not shown unique circumstances justifying allowing it to "split-the football." Indeed, despite our specific directive in the *Reinstatement Order*, in its Waiver Request, Great Lakes did not address this issue. Therefore, in this case, we conclude that the Commission's general policy should apply and that Great Lakes should not be allowed to "split-the-football" with active, co-channel EBS licensees. Accordingly, any grant of the Renewal Application shall contain the following condition:

The licensee's geographic service shall not include any portion of its former protected service area that overlapped with another licensee whose license was in active status on January 10, 2005 and on the date the expired licensee's late-filed renewal application was granted.

IV. CONCLUSION AND ORDERING CLAUSES

11. For the reasons discussed above, we conclude that the unique circumstances surrounding Great Lakes' Renewal Application justify a waiver of former Section 74.15(e) and current Section 1.949(a) of the Commission's Rules to allow consideration of its late-filed renewal application. We also conclude that Great Lakes has not shown unique circumstances that would justify allowing it to "split-the-football." We direct processing of the Renewal Application.

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.925, 1.949(a), and 74.15(e) of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.949(a), 74.15(e), that the request for waiver filed by Davenport Schools, Inc. d/b/a Great Lakes Jr. College on March 25, 2010 in connection with File No. 0004187114 IS GRANTED.

²² 47 C.F.R. § 1.949(a).

²³ See *116 Late-Filed Renewals Order*, 24 FCC Rcd at 8116-8117 ¶ 24.

²⁴ *Id.* at 8117 ¶ 25.

13. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.949 and 74.15(e) of the Commission's Rules, 47 C.F.R. §§ 1.949, 74.15(e), that the licensing staff of the Broadband Division SHALL PROCESS the application for renewal of Educational Broadband Service Station WLX253 filed by Davenport Schools, Inc. d/b/a Great Lakes Jr. College on March 25, 2010 (File No. 0004187114) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

14. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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